☐ EXPEDITE
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Date: _____
Time: _____
Judge/Calendar: _____
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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

WASHINGTON FAMILIES STANDING TOGETHER and ANNE LEVINSON,

Plaintiffs,

v.

SECRETARY OF STATE SAM REED, in his official capacity, and PROTECT MARRIAGE WASHINGTON,

Defendants.

No.

PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

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TABLE OF CONTENTS

I. RELIEF REQUESTED

Plaintiffs Washington Families Standing Together ("Washington Families") and Anne Levinson (together, "Plaintiffs") move pursuant to CR 65, RCW 7.40.020, and RCW 29A.72.240 for an injunction against defendant Secretary of State Sam Reed ("the Secretary") preventing Referendum 71 ("R-71") from being placed on the ballot.

Plaintiffs filed an action for writs of mandamus, prohibition and certiorari in King County Superior Court (Cause No. 09-2-31908-1 SEA) seeking to prevent the Secretary of State from certifying R-71 for the ballot based on the Secretary's refusal to correct certain legal errors that the Secretary had made with respect to which signatures were included in the count of signatures on the R-71 petition. On September 2, 2009, the King County Superior Court entered an Order on Plaintiffs' Motion for Temporary Restraining Order ("Order") making findings of fact that confirmed Plaintiffs' allegations that the Secretary had accepted petitions that were not in accordance with state law. The Order is attached to the Declaration of Amanda J. Beane ("Beane Decl.") as Exhibit A. However, at the same time, the King County Superior Court concluded that "[o]nly after certification can opponents of a referendum challenge it in court, and then only in compliance with RCW 29A.72.240."

RCW 29A.72.240 provides for expedited procedures for an opponent's challenge to the Secretary's certification of a referendum:

> Any citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters may, within five days after such determination, apply to the superior court of Thurston county for a citation requiring the secretary of state to submit the petition to said court for examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof to the legislature, as the case may be. Such application and all proceedings had thereunder shall take precedence over other cases and shall be speedily heard and determined.

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> The decision of the superior court granting or refusing to grant the writ of mandate or injunction may be reviewed by the supreme court within five days after the decision of the superior court, and if the supreme court decides that a writ of mandate or injunction, as the case may be, should issue, it shall issue the writ directed to the secretary of state; otherwise, it shall dismiss the proceedings. The clerk of the supreme court shall forthwith notify the secretary of state of the decision of the supreme court.

On September 2, 2009, the Secretary of State certified R-71 for the ballot. This action was commenced on September 3, 2009. Consistent with the expediting required in RCW 29A.72.240, Plaintiffs hereby request immediate action on this request for injunctive relief. Speedy resolution is particularly critical as the Secretary has emphasized the approaching deadlines for the preparation of the voters' pamphlet and ballot.[1]

II. STATEMENT OF FACTS

In her Order, Judge Julie Spector of the King County Superior Court made the following findings of fact based on the record submitted there and that has been resubmitted here:

> On July 25, 2009, Protective Marriage Washington ["PMW"] submitted approximately 137,883 signatures in support of R-71 to the Secretary of State's office. Under RCW 29A.72.150, a referendum requires 4% of the electors from the last gubernatorial election to sign petitions to qualify for the ballot. The Secretary of State determined this number to be 120,577. As of August 31, 2009, the Secretary of State had approved 121,486 signatures in support of R-71.
>
> On July 25, 2009, proponents of R-71 organized the boxes of petitions at the bottom of the Capitol stairs in Olympia. In doing so, they realized that many signature-gatherers had not filled out the declaration on the back of the petition. In response to the missing signatures, PMW members obtained a signature stamp from Lawrence Stickney, the campaign manager for PMW, and stamped his name and signature to

[1] The Secretary suggests that September 10 is what he terms a "drop dead" date for the printing of the voters' pamphlet, although such dates are typically a matter of administrative convenience to ensure availability of preferred printing vendors. While it is obviously important to expeditiously resolve the issues presented by this litigation, with all due respect the Secretary's vendor's preferred printing deadlines cannot, as a matter of law, preclude, truncate or obstruct the right of Washington citizens to invoke their indisputable right for judicial review of the Secretary's decisions. Indeed, judicial review is particularly important where, as here, the Secretary declined to consider many of the issues presented by Plaintiffs or resolutely relied on a flawed interpretation of state law provided by an opinion of the Attorney General.

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many of the petitions with blank declarations. It is estimated that over 2,500 petitions lacked signature gathers' signatures.

The Secretary of State accepted 33,966 signatures on 2,508 petitions where the declaration was stamped with Mr. Stickney's name after the fact. The Secretary of State also accepted 2,058 signatures on 162 petitions where the signature-gatherer declaration was left entirely blank.

PMW submitted so few signatures above the minimum required that the Secretary of State was not confident that a random statistical sample would accurately demonstrate whether there were sufficient valid signatures to certify the measure for the ballot. As a result, the Secretary of State determined that a 100% check of all signatures submitted on July 25, 2009 would be conducted.

On July 31, 2009, the Secretary of State began to determine how many valid signatures had been submitted. During the check, SOS staff first compared the signatures on the petitions to signatures on file in the statewide voter registration database to determine if each signature was that of a registered voter. Signatures rejected in the initial check were then submitted to a "master checker," someone with more experience who reviewed whether they had been correctly rejected. Then, SOS staff checked the remaining rejected signatures an additional time against an updated list of voters who had registered after June 19, 2009, and throughout the verification process.

The Secretary of State specifically instructed staff to accept signatures regardless of voter registration date. As a result, a number of signatures were accepted from voters who were not registered at the time they signed the petitions. Some had registered after the R-71 petitions were filed.

Order at 2-3 (citations omitted).

The King County Superior Court then proceeded to recognize Plaintiffs' concerns with these actions of the Secretary. Specifically, her Order stated (again based on the record before her and that has been resubmitted here):

> The Secretary of State concedes that he instructed his staff to accept signatures of voters who were not registered when they signed the petition. The court notes that the plain language of the Washington State Constitution and the Revised Code of Washington requires voters to be registered *before* signing. While it may be common practice for individuals to register simultaneously with signing referendum petitions, and it may even be good policy, that does not mean that the practice is in accordance with Washington law. ...
>
> [PMW] also admits that their members stamped the declarations of thousands of petitions with Mr. Stickney's signature before filing the referendum petitions with the

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> Secretary of State. Likewise, the Secretary of State concedes that he has accepted more than 35,000 signatures where the signature-gatherer's declaration was either left blank or stamped *en masse* with Mr. Stickney's signature. In making this determination, the Secretary of State has relied on an opinion by the Attorney General issued in 2006. That opinion states that RCW 29A.72.130 requires not that the signature-gatherer actually sign the declaration, but only that the declaration be printed on the back of each petition. Op.Atty.Gen.2006, No. 13. Based on the statute's plain language and the legislative history, this essentially renders this declaration requirement meaningless. In adherence with the opinion of the Attorney General, the Secretary of State requires only a signature block to be printed on each petition, but does not require the same to be signed. ...
>
> Further, neither the Secretary of State nor PMW/Intervenor has addressed the plaintiffs' allegations of fraud whereby individuals were allegedly deceived into signing the petitions. Specifically, there are allegations that signature-gatherers told some individuals that the referendum would protect domestic partnerships when in fact just the opposite was true. In addition, the highlights at the top of the petitions contain apparent falsehoods, hyperbole, and unsubstantiated claims.fn1
>
> [fn1. "If same-sex marriage becomes law, public schools K-12 will be forced to teach that same-sex marriage and homosexuality are normal ... even over the objections of parents. Sign R-71 to protect children."]
>
> The required signature-gatherer's declaration swears that the individuals who signed the petition did so "knowingly."fn2 It is unclear whether a signature-gatherer can swear that an individual signer has signed the petition "knowingly" when the signature-gatherer has allegedly misrepresented the contents of the petition. Neither the Secretary of State nor PMW/Intervenor has answered this question.
>
> [fn2. "I, _____ *swear or affirm under penalty of law* that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition *knowingly* and without any compensation or promise of compensation willingly signed his or her true name and that the information provided therewith is true and correct." RCW 29A.72.130 (emphasis added).]
>
> ... It is conceded that the number of signatures represented by these inadequate petitions is significant. Without them, the Secretary of State could not certify Referendum 71 for the ballot.

Order at 6-8 (emphasis in original; citations omitted).

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III. STATEMENT OF ISSUES

Has the Secretary exceeded the scope of his authority by accepting petitions and signatures in violation of law, thereby requiring entry of an injunction preventing R-71 from being placed on the ballot?

IV. EVIDENCE RELIED UPON

Plaintiffs rely upon: (1) the Complaint and attachment thereto; and (2) the Declaration of Amanda J. Beane, to which is attached the following Declarations of Kevin J. Hamilton, Anne Levinson, Jonathan Macaranas, and William B. Stafford, that had been submitted to the King County Superior Court, and attachments thereto;[2] and (3) the Declarations of Mona Smith and Michael Snyder submitted herewith, and attachments thereto.

V. AUTHORITY AND ARGUMENT

A. Plaintiffs Have Clear Legal and Equitable Rights Entitling Them to Injunctive Relief

Under RCW 29A.72.240, Plaintiffs may apply for an injunction to prevent Referendum 71 from being placed on the ballot if there are an insufficient number of legally valid signatures to qualify it. "It is an established rule in this jurisdiction that one who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him." Tyler Pipe Industries, Inc. v. State, Dept. of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). The Court also has authority to issue writs requiring agencies to perform duties required by law and to desist from conduct that exceeds the agency's authority or that are otherwise arbitrary and capricious. RCW 7.16; see also State ex rel. Donohue v. Coe, 49 Wn.2d 410 (1956) (court may intercede when

[2] All of the pleadings, including the opposing declarations, and the briefing on Plaintiffs' motion for TRO, that were filed in the King County Superior Court are available on the Secretary's website at the following url: http://wei.secstate.wa.gov/osos/en/initiativesReferenda/Pages/R71_Litigation_State.aspx

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the Secretary, in performing referendum related duties, "acts without authority or in an arbitrary and capricious manner. . . . "). Here, the Secretary exceeded his authority under Wash. Const. Art. II, § 1(b) and RCW 29A.72.130 by improperly accepting (1) thousands of petitions with invalid declarations; and (2) signatures of persons not registered at the time they signed the petitions. In turn, the Secretary has improperly certified R-71 for the ballot. Plaintiffs are entitled to injunctive relief.

The Secretary has offered no answer to the second of these violations of state law, relating to the counting of signatures of persons who were not registered when they signed the petition. As discussed below, there can be no question that the Secretary has acted in violation of both the Constitution and statutory provisions in accepting these signatures. Indeed, the King County Superior Court specifically so concluded.

With respect to the first issue, the Secretary has argued that he is bound by the public opinion of the Office of the Attorney General ("AGO"), in which the AGO concluded that RCW 29A.72.130 requires the declaration to be *printed* on the reverse side of the petition but does not require the signature-gatherer to *sign* the declaration.[3] In so arguing, the Secretary concedes that he exercised no discretion in accepting petitions without valid signatures from the gatherers, but instead simply followed the command of the AGO.[4] The AGO is flawed and erroneous, as the King County Superior Court noted in the Order.

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[3] See Wash. AGO 2006 No. 13, 2006 WL 1669416.

[4] The Secretary also has suggested that he might have been required to accept these unsigned petitions on the basis of PMW's "reliance" on the Secretary forwarding the AGO opinion to PMW. However, there is no evidence that the Secretary accepted the petitions on this basis. Moreover, this hypothetical "reliance" argument is inconsistent with the record. The R-71 proponents knew that a signed declaration was required and cautioned circulators that their petitions would be rejected if they did not sign the declaration. Hamilton Decl. Ex. D. The petition contains a signature line in the declaration with a bold black arrow pointing to it. Proponents advised their signature-gatherers publicly that the petitions would not be counted unless the declarations were completed. That R-71 proponents knew that the declarations must be filled in, if not signed, is also evidenced by the fact that they stamped petitions with Mr. Stickney's name just before turning the petitions in to the Secretary. Hamilton Decl. ¶ 5. There was no reliance here, nor could there have been as a matter of law.

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As a result, neither Schrempp v. Munro, 116 Wn.2d 929 (1991), nor Cmty. Care Coal. of Wash. v. Reed, 165 Wn.2d 606 (2009), are of any assistance to the Secretary. Those cases both addressed technical deficiencies in initiatives having to do with whether the initiatives were properly titled or properly indicated whether they were to the legislature or to the people. Critical, fraud-prevention measures were not at stake. Neither case presented a post-certification challenge to the Secretary's inclusion in the tally of signatures on petitions that are violative of the Legislature's express provisions for preventing fraud in the referendum process. Rather, the Court in Schrempp held that the Secretary was acting pursuant to a grant of discretionary authority—his right to accept or not accept petitions that simply did not *substantially* comply with the requisite form. The Court held that it was "clear" that "the Secretary of State was not acting contrary to law." 116 Wn.2d at 937-38. The Court in Cmty. Care likewise found that the Secretary exercised its discretion to accept petitions that had certain flaws, not "clearly contrary to the law." 165 Wn.2d at 619-20.

Here, the Secretary can hardly claim to have exercised his discretion to accept petitions that violated state law for failure to include the required declaration. By his own admission, he did precisely the opposite: he accepted these petitions *because he thought he had to and because he thought, in reliance on a flawed AGO, that the petitions were lawful without complete and truthful declarations of the signature-gatherers*. Whatever discretionary authority the Secretary may or may not have to accept petitions that on their face fail to comply with Washington law specifically directing enforcement of certain anti-fraud requirements, indisputably he can only exercise his discretion by doing so consciously and deliberately. His acceptance of these petitions, in reliance on a flawed interpretation of law and nothing more, cannot be defended as an exercise of discretion; it was precisely the opposite.

Furthermore, there must be bounds to the Secretary's "discretion"; he cannot simply ignore legislative dictates with respect to how the referenda process is to operate, replacing the Legislature's judgment with his own. He cannot ignore our constitution. At a minimum, the

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Court has the power to enjoin the Secretary from exercising "discretion" where doing so results in total disregard of substantial noncompliance with legislative or constitutional mandates with respect to who qualifies as a legal voter for purposes of the referenda process or what signature-gatherers are required to do to prevent those voters from being defrauded.

1. Improper Acceptance of Petitions Not Signed by the Signature-Gatherer

The Secretary accepted 162 petitions with unsigned declarations, which contain 2,508 signatures, and 2,058 declarations stamped with Mr. Stickney's name, but not signed by any signature-gatherer, on petitions containing 33,966 signatures. Hamilton Decl. ¶ 5. SOS staff watched as some or all of these declarations were stamped minutes before the petitions were delivered to the SOS. Id. These petitions do not comply with RCW 29A.72.130—they were not signed by the signature-gatherers who circulated them. Indeed, any declaration "signed" by Mr. Stickney on a petition that he did not circulate is a fraudulent attestation, as is a declaration someone signed on his behalf. By accepting these petitions, the Secretary improperly added as many as 36,024 signatures to the count.

a. Petitions Are Not Valid Unless the Signature-Gatherer Has Signed the Statutorily Mandated Declaration

Washington law requires that each petition include a "declaration" to be signed by the signature-gatherer that requires the signature-gatherer to "swear or affirm under penalty of law that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition knowingly and without any compensation or promise of compensation willingly signed his or her true names and the information provided therewith is true and correct." RCW 29A.72.130.

"Where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words." In re Estate of Jones, 152 Wn.2d 1, 11 (2004). RCW 29A.72.130 plainly requires the person who circulated

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the petition to fill out the declaration. If the declaration is not signed, the petition does not contain the information required by statute. RCW 29A.72.170.

This unambiguous statute requires no construction. Regardless, the plain meaning of RCW 29A.72.130 is confirmed by its legislative history. The statute codified House Bill 1222, which manifested the Legislature's intent that signature-gatherers sign the declaration. See House Bill Report E.H.B. 1222 ("Forging signatures is already a crime, but it is hard to catch people who do it. This bill would require the signature-gatherers to supply their names so we can go back and check"); Senate Bill Report E.H.B. 1222 ("[W]hen there is evidence of signature fraud on the sheets, there is no way to figure out who forged the signatures. This bill . . . makes it easy to line up the signature-gatherer and the sheets he or she turns in").[5]

The State clearly has a compelling interest in combating signature fraud.[6] Indeed, every state that requires a signature-gatherer declaration requires it to be signed,[7] and courts in other states have rejected petitions that do not contain a properly executed declaration. See, e.g., Fabec v. Beck, 922 P.2d 330 (Colo. 1996). As stated in Brousseau v. Fitzgerald, 675 P.2d 713, 716 (Ariz. 1984), an unsigned declaration cannot serve its anti-fraud function:

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[5] See also House Floor Debate H.B. 1222, Mar. 8, 2005 ("This bill would require the signature-gatherer to sign each page of the petition that they have gathered those signatures . . ."); House Comm. on State Gov't Oper. & Acc't, Hr'g on H.B. 1222, Feb. 8, 2005 (H.B. 1222 "hold[s] the signature-gatherers accountable . . . [by] getting . . . their signature on every initiative petition so that if there are problems we can go back and inquire about them"); id. ([I]f everyone . . . sees this statement and . . . know[s] that they will have to sign it . . . that serves to inform them of their responsibilities"). The effect of Senate Amendment 499, the bill's final change, was described by the amendment itself to "[r]equire[] that the declaration *to be signed by the individual circulating the petition* be printed on the reverse side of the petition." (emphasis added).

[6] Sudduth v. Chapman, 88 Wn.2d 247, 251 (1977); see also Lemons v. Bradbury, 538 F.3d 1098, 1104 (9th Cir. 2008) (a state's "interests in detecting fraud . . . are weighty and undeniable" and referenda petitions pose a peculiar threat of fraud); Initiative Referendum Inst. v. Jaeger, 241 F.3d 614, 616 (8th Cir. 2001) (s); Montanans for Justice v. Montana, CDV-06-1162(d) (Mt. Dist. Ct. Sept. 13, 2006).

[7] ALASKA STAT. § 15.45.130; ARIZ. REV. STAT. ANN. § 19-112; ARK. CODE ANN. § 7-9-108; CAL. ELEC. CODE § 104; COLO. REV. STAT. § 1-40-111; IDAHO CODE ANN. § 34-1807; 10 ILL. COMP. STAT. 5/28-1; ME. REV. STAT. ANN. tit. 21-A §§ 354; 902; MO. REV. STAT. § 116.080; MONT. CODE ANN. § 13-27-302; NEB. REV. STAT. ANN. 32-628; NEV. ADMIN. CODE § 295.020; N.D. CENT. CODE § 16.1-01-09; OHIO REV. CODE ANN. § 3519.05; OKLA. STAT. TIT. 34, § 6; OR. REV. STAT. § 250.045; S.D. CODIFIED LAWS § 2-1-10; UTAH CODE ANN. § 20A-7-203; WYO. STAT. ANN. § 22-24-114.

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> To allow the integrity of the . . . petition process to be violated by . . . certification of the petitions by persons other than the actual circulators without any sanction other than the inconvenience of showing that the signatures were in fact authentic would render the circulation requirement meaningless. . . ."

Thus, a petition that is submitted *without* the signature of the individual who actually circulated the petition "does not contain the information required" by RCW 29A.72.130. The Secretary lacks authority to arbitrarily read a fundamental component of the referendum petition, like the declaration out of the governing statutory scheme. RCW 29A.72.170. As noted by the King County Superior Court, "based on the statute's plain language and the legislative history, [the Secretary's interpretation] essentially renders the declaration requirement meaningless." Order, at 7.[8]

b. The Attorney General Opinion Was Wrong and This Court Should Not Defer to It

The AGO's analysis to the contrary is plainly flawed and must not be followed.[9] First, the AGO incorrectly found that the statute was ambiguous because it neither expressly requires the declaration to be signed nor contains a line entitled "signature." Wash. AGO 2006 No. 13, at 5. But RCW 29A.72.130 requires the signature-gatherer to "swear or affirm" to certain facts under penalty of law and provides a line for the signature-gatherer's name. There is nothing ambiguous about this because a signature-gatherer cannot "swear or affirm" to anything unless he or she signs the declaration. And indeed, the declaration provided on the PMW petition

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[8] Here, irregularities in the signature verification process further support that the anti-fraud measures enacted by the Legislature are critical. See Declaration of Mona Smith and Declaration of Michael Snyder, submitted herewith.

[9] Courts "give[] little deference to AGO opinions on issues of statutory construction." ATU Leg. Council of Wash. State v. State of Washington, 145 Wn.2d 544, 553 (2002). See also Wash. Fed'n of State Employees v. Office of Fin. Mgmt., 121 Wn.2d 152, 164-65 (1993)) ("The court remains the final authority on the proper construction of a statute"). The Washington Supreme Court has repeatedly rejected AGO interpretations of statutes. See, e.g., Am. Legion Post No. 32 v. Walla Walla, 116 Wn.2d 1, 9 (1991); Davis v. County of King, 77 Wn.2d 930, 934 (1970)); Kasper v. City of Edmonds, 69 Wn.2d 799, 805 (1966). The fact that the AG opinion has been in existence for a short period of time should not increase the level of deference due to it, especially when it flatly contradicts the statutory language.

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included a signature line and PMW cautioned its signature-gatherers that their petitions would be rejected if they did not sign the declaration. Hamilton Decl. Ex. D.

On the basis of this "inconsistency," the AGO found the statute ambiguous and then proceeded to conduct an equally flawed analysis of the law's legislative history. The AGO ignored the bill reports described above and relied almost entirely on the legislative history of *another bill that was not passed by the Legislature*. Wash. AGO 2006 No. 13, at 7-9. Using this flawed approach, the AGO concluded that the legislative history of House Bill 1222 was *itself* ambiguous and proceeded to set out its own interpretation of the statute. Id. at 9. In fact, as noted above, the legislative history on the law is as clear as the statute itself—the purpose was to prevent fraud by requiring signature-gatherers to sign the petitions.[10]

The AGO's interpretation leads to absurd results. It found that the declaration is "designed to prevent . . . fraud" and that it "seems anomalous that the Legislature would require each petition to include a 'declaration' but did not intend that the declaration actually be filled out." Id. at 4, 13. It would be more than "anomalous." Courts "presume that the Legislature does not indulge in vain and useless acts. . . ." Kelleher v. Ephrata Sch. Dist, 56 Wn.2d 866, 872-73 (1960). The AGO, on the other hand, has determined that the Legislature created an extraneous, nugatory declaration. Compare AGO 2005 No. 13 at 11-12 (acknowledging that its "interpretation . . . appears to render the words 'I, _____, swear or affirm under penalty of law' superfluous") with State v. Roggenkamp, 153 Wn.2d 614, 624 (2005) ("[D]rafters of legislation are presumed to have used no superfluous words . . . .").

Likewise, the Secretary and the AGO ignore the declaration's explicit requirement that the signature-gatherer "swear or attest" to the truth of the statements. Even if no signature is required, this is an "oath," defined as "an affirmation and every other mode authorized by law of attesting to the truth of that which is stated." RCW 9A.72.010(2). A written statement is made

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[10] The reported signature-gathering tactics involved in Referendum 71 are examples of why RCW 29A.72.130 is necessary. Hamilton Decl., ¶ 3, Ex. B.

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under oath if it was "made on or pursuant to instructions on an official form bearing notice, authorized by law, to the effect that false statements are punishable." RCW 9A.72.010(2)(a). That is just what the Legislature required here.

Moreover, even if the Attorney General were permitted to change the plain language of a statute because the legislative history of a similar bill was arguably ambiguous, many of the petitions here plainly violate the statute, RCW 29A.72.130, in ways *neither* considered by the AGO *nor* subject to the (inapplicable and irrelevant) legislative history cited in the AGO. Many signature-gatherers not only did not sign the declaration required for the express purpose of preventing fraud but did not even identify themselves in the space where the Legislature required that they do so, for the purpose of signifying that they had read the legislative warning and declaration.[11] There can be no dispute that the Legislature intended, at least, that the signature-gatherer write his or her name between the words "I" and "swear." The AGO supports the importance of this *identification* space by emphasizing the absence of a *signature* space and by requiring rejection of petitions that omit the declaration. If it is essential that the declaration be printed on the back of the petition, then it is equally essential that the demanded identification be provided, to tie the signature-gatherer to any misconduct, to make that connection clear to her, and to assure that she has addressed her attention to the warnings in the declaration.

Finally, one individual (Mr. Stickney) falsely indicated that he was personally responsible for thousands of petitions circulated by others—including paid circulators whose actions have been challenged as fraudulent by some voters. The AGO certainly cannot countenance such fraudulent conduct. [12]

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[11] Under RCW 9.A.04.110(24), "'Signature' includes any memorandum, mark, or sign made with intent to authenticate any instrument or writing, or the subscription of any person thereto."

[12] "Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false." RCW 9A.72.080. Moreover, the Secretary's acceptance and filing of the petitions falsely signed by Mr. Stickney violates RCW 9.44.080: "[E]very person who . . . , knowing that

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Indeed, for precisely these reasons, the King County Superior Court flatly rejected the Secretary's position and the AGO opinion. Opinion, at 7.[13] The same result should obtain here.

2. The Secretary Has Accepted Signatures of Individuals Who Were Not Registered to Vote at the Time They Signed a R-71 Petition

Similarly, the Secretary exceeded his authority by accepting signatures of individuals who were not registered at the time they signed a petition. Hamilton Decl. Ex. G. Under Wash. Const. Art. II, § 1(b), legislative acts can be put to a vote of the people if a sufficient number of "legal voters" sign a petition. "Legal voter" is synonymous with "registered voter." See id.; see also Cedar County Comm. v. Munro, 134 Wn.2d 377 (1998).

An individual must be registered when he or she signs the petition.[14] Each petition must include a place for each signer to list the address "at which he or she *is* registered to vote." RCW 29A.72.130 (emphasis added). By signing a petition, a signer attests that "I *am* a legal voter . . . ," Id. (emphasis added). And the petition must contain a warning that "[e]very person who . . . signs this petition when he or she *is* not a legal voter . . . may be punished by fine or imprisonment. . . . " RCW 29A.72.140 (emphasis added). These statutes, written in the present tense, require each individual to attest that he or she *is* a registered voter—not that he or she plans to register in the future. See Yelle v. Bishop, 55 Wn.2d 286, 303 (1959) (refusing to "

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any . . . petition contains any . . . false or wrongful signature or statement, shall file the same, or . . . as a true and genuine petition, shall be guilty of a misdemeanor."

[13] The King County Superior Court was particularly concerned that misrepresentations on the face of the petition itself, which state on their face that "[I]f same-sex marriage becomes law, public schools K-12 will be forced to teach that same-sex marriage and homosexuality are normal . . . even over the objections of parents. Sign R-71 to protect children." As the Order states, "[i]t is unclear whether a signature-gatherer can swear that an individual signer has signed the petition 'knowingly' when the signature-gatherer has allegedly misrepresented the contents of the petition. Neither the Secretary of State nor PMW/Intervenor has answered this question." Order at 7.

[14] Where an organization collects registration application forms during a petition drive, a new voter is not actually registered until the date the form is received by the SOS or county auditor. RCW 29A.08.115. "'Registered Voter'" means any elector who has completed the statutory registration procedures established by this title." RCW 29A.04.145. The Washington Constitution provides that "[t]he legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote." Wash. Const. Art. VI § 7.

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read[] into . . . statute the future tense and ignore[e] its use of the present tense"); State v. Hornaday, 105 Wn.2d 127-28 (1986) (interpreting statute based on use of present tense). If the SOS could count the signatures of individuals who are registered as of the date the signature is verified, whether a person faces punishment for falsely attesting that he or she was a legal voter would turn on whether the SOS happened to verify the signature before the voter *did* register. The SOS bundled R-71 petitions randomly. The date at which a signature was reviewed was happenstance and could have occurred on any date between July 25 and September 2nd. Under this theory, if two signers registered at the same time, but the petitions happened to be reviewed on different dates, the SOS could determine one to be valid and the other not. As the Secretary has no authority to count signatures of persons who were not registered when they signed a petition, he has exceeded the scope of his authority and acted arbitrarily and capriciously.

The King County Superior Court reached precisely this conclusion, noting that "the plain language of the Washington Constitution and the Revised Code of Washington requires voters to be registered *before* signing. While it may be common practice for individuals to register simultaneously with signing referendum petitions, and it may even be good policy, that does not mean that the practice is in accordance with Washington law. No Washington court has ever considered this issue, but state supreme courts in other jurisdictions have decided resoundingly against the Secretary of State's position." Order, at 6 (citations omitted; emphasis in orginal).

B. Plaintiffs Have a Well-Grounded Fear of an Immediate Invasion of Their Rights

The Secretary has certified R-71 even though PMW submitted an inadequate number of valid signatures. RCW 29A.72.250. R-71 would not qualify for the ballot without the inclusion of the unlawfully accepted petitions and the signatures of individuals not registered when they signed the petition.

C. The Secretary's Conduct Threatens Actual and Substantial Injury to Plaintiffs

Plaintiffs will suffer immediate and irreparable damage if the Court does not grant relief. If an injunction does not issue, R-71 will be placed on the general election ballot in violation of

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Washington law. Furthermore, certification of R-71 for the ballot is causing further delay in the enhanced domestic partnership law becoming. Wash. Const. Art. II, § 1. WAFST represents the interests of over 5,800 registered domestic partnerships. Unless the law becomes effective, domestic partners, many with children, will be left without the protections and rights that the law provides their families.

D. Injunctive Relief Will Not Harm the Secretary and Will Serve the Public Interest

The equities in this case decidedly favor the Plaintiffs. The public has a significant interest in ensuring that the referenda process is not tainted by fraud and that only referenda that have garnered the support of the required number of *legal* voters are placed on the ballot. By contrast, the Secretary will suffer no harm if the Court enters injunctive relief. Tasked with ensuring that elections are conducted in accord with Washington law, the Secretary suffers no harm by entry of injunctive relief designed to require him to do so.

E. Plaintiffs Should Not Be Required to Post a Bond

Because Plaintiffs seek a permanent injunction, a posting of a bond is not required. See CR 65(c) (requiring security only for restraining order or preliminary injunction). If Plaintiffs are granted preliminary relief, no bond should be required. The bond may be nominal in appropriate circumstances. Indeed, federal courts may require no bond where the nonmoving party fails to demonstrate any injury. Cont'l Oil Co. v. Frontier Ref. Co., 338 F.2d 780, 782 (10th Cir. 1964). Here, there is no indication that the Secretary would suffer any cognizable harm during the short time that a temporary restraining order would be in effect. For this reason, the Court should waive the bond requirement entirely.

VI. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that their motion be granted, and that the Secretary be enjoined from placing R-71 on the general election ballot.

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